court. Any such exercitation would mutate and indeed mutilate the intention of the legislature and amount to unwarranted judicial transgression into the legislative domain. To accept the submissions put to us on behalf of the appellants would be to countenance in the realm of statutory construction a free-for-all like the aftermath of an English football match.

We accordingly at the conclusion of argument for the reasons we have discussed dismissed this appeal with costs and directed the deposit lodged in court by way of security to be paid out to the respondents.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Shearn Delamore & Co.*

Cur. Adv. Vult.

T.R. HAMZAH & YEANG SDN. BHD. v. LAZAR SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) March 21 & 23; September 22, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 46 of 1983]

Architects – Claim for balance of professional fees – Dispute – Counterclaim for negligence – Architect terminating his employment and refusing to issue letter of release to enable another architect to be employed – Application to court for architect to issue letter of release – Order made – Appeal – Architect's lien on plans – Licence to use plans – P.A.M. Conditions of Engagement.

Practice and Procedure – Interlocutory application – Interim injunction – Perpetual injunction – Mandatory order – Forms in Schedule – Variations – R.H.C. 1980, O.1 r.7 & O.29 r.1.

In this case the respondent employed the appellant, a firm of architects to build a 27 storey office building at Jalan Ampang on the usual terms as defined by the Pertubuhan Arkitek Malaysia (P.A.M.) conditions of engagement. The overall fee agreed was 4% of the total contract cost of the project. While approval of the plans was still under consideration by the relevant authority, the appellant sued the respondent for balance of the professional fees of $514,000.00. The respondent denied the claim and counterclaimed for breach of contract. Subsequently the appellant terminated its services as architects on the ground of failure of payment of fees. The respondent requested that the dispute be referred to the P.A.M. for decision and pending reference that the appellant should issue a letter of release to enable them to engage another architect to continue with the work. The appellant denied the request and said that until all the fees were paid they would not issue a letter of release. The respondent applied by summons-in-chambers for an order that the appellant forthwith issue the respondent with a letter of release to enable the respondent to engage another architect to proceed with the proposed construction of the building. The learned Judge of the High Court made an order in terms. The appellant appealed.

Held: that in the circumstances of this case, the court could not allow the architect to withhold the letter of release as to do so would mean "that the architect can hold the client to ransom".

Cases referred to:

(1) *Blair* v. *Osborne & Tomkins* [1971] 2 Q.B. 78, 86.
(2) *Caldwell* v. *Sumpters* [1972] Ch. 478.
(3) *Stovin-Bradford* v. *Volpoint Ltd.* [1971] Ch. 1007.
(4) *Gebruder Naf* v. *Ploton* (1890) 25 Q.B.D. 13.
(5) *Morgan* v. *Greatrex* (1884) W.N. 21.
(6) *Soon Nam Co. Ltd.* v. *Archynamics Architects* [1979] 1 M.L.J. 212.
(7) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 510.
(8) *Gibb & Co.* v. *Malaysia Building Society Bhd.* [1982] 1 M.L.J. 271.
(9) *Richards* v. *Richards* [1983] 3 W.L.R. 173.
(10) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chai Ngen Yiok* [1975] 2 M.L.J. 109.
(11) *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150.
(12) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228.
(13) *Jackson* v. *Normanby Brick Co.* [1899] 1 Ch. 438.
(14) *Davies* v. *Gas Light and Coke Co.* [1909) 1 Ch. 708.
(15) *Re Court Hill Canteen* [1972] 2 M.L.J. 257.
(16) *Astro Exito Navegacion S.A.* v. *Southland Enterprise Co. Ltd. & Anor.* [1982] 3 All E.R. 335.
(17) *Smith* v. *Peters* (1875) L.R. 20 Eq. 511.
(18) *Ebdy* v. *M'Gowan, Hudson* Building Contracts 4th edition Vol. III p.9.

HIGH COURT.

P. Cumaraswamy for the defendant (applicant).

S. Narayanan for the plaintiff.

Cur. Adv. Vult.

Chan J.: This case raises points of great interest to architects and to those who employ them professionally.

T.R. Hamzah & Yeang Sdn. Bhd. is a limited company. It is a firm of architects. It is the plaintiff in these proceedings. The defendant, Lazar Sdn. Bhd. employed Hamzah & Yeang as architects for a project to put up a 27-storey building at Jalan Ampang, Kuala Lumpur. The architects accepted

the engagement and told Lazar that their terms would be: (1) the full fee is 4 per cent. of the total cost of the building *i.e.* when the architects do the whole work right through to completion (2) a schedule of partial payment of the full fee at the various earlier stages is to be agreed on separately, and (3) in the event of an abandonment of the project or a termination of the engagement, the payment of a portion of the total fee that is due at that stage shall be in accordance with the P.A.M. scale of charges. That was in April 1980. After a lapse of a little over two years, in August 1982, the architects issued the writ in these proceedings claiming $514,000 as the balance of fees that they say are due to them at that stage for partial services performed up to February 28, 1982. They showed the working-out of their accounts thus:

PROJECT : PROPOSED 27-STOREY OFFICE BUILDING ON LOTS 51 AND 52 SECTION 45, JALAN AMPANG, K. LUMPUR FOR LAZAR SDN. BHD.

1. Schematic design and submission for Planning Approval – approval obtained May 7, 1981.
2. Design Development and submission for Building Approval – approval obtained December 2, 1981.
3. Instructions by Client to prepare drawings for construction and tender on September 3, 1981. All 1/8" scale plans, elevations and sections completed constituting 70% of stage (3) below.

Fee Percentage

1.	Schematic stage	15%
2.	Design Development stage	35%
3.	Contract Documentation stage (70% of 25%)	17.5%
		67.5% of total fees due

Basing on construction estimate of $22,000,000

Fees = 4% x 67.58 x $22,000,000
= $594,000
Fees paid to date = $ 80,000
Fees owing = $594,000 - $80,000
= $514,000

That statement is clearly made from section 8.1 of the P.A.M. scale of charges which says:

Phase	Percentage fee for phase	Cumulative percentage total fees
Schematic Design Phase	15%	15%
Design Development Phase	35%	50%
Contract Documentation Phase	25%	75%
Contract Management Phase	25%	100%

This section or paragraph lays down – to borrow the words of Widgery L.J. in *Blair* v. *Osborne & Tomkins*[1] – "precise conditions as to the fees to which the architect will be entitled in the event of partial services only being performed. The scheme of the paragraph is to divide the total work into stages and to indicate what portion of the total fee is to be paid to the architect on the reaching of any one of those stages". Of course, Widgery L.J. was speaking of the British R.I.B.A. scale of charges. But his remarks apply as much to the P.A.M. scale.

Lazar delivered its defence in September 1982. It says, *inter alia*, that the charge of $514,000 is excessive because it is not a real estimate of the fees due at that stage, so that the architects are entitled to be paid only on a *quantum meruit*. Lazar may well be right because the building has still to be built and the schedule for the partial payment of the full fee at the various stages before completion has yet to be agreed upon. What Lazar really is saying amounts to this: that, according to conditions (2) and (3) of the terms of engagement, the P.A.M. scale for the payment of a portion of the total fee at the various earlier stages does not apply in this case because there was no agreement to apply it but that it would apply where there was an abandonment of the project or a termination of the engagement.

But at that time, there was no abandonment of the project nor was there, as yet, any determination of the engagement, and the scheme for a portion of the total fee to be paid in stages in accordance with condition (2) of the terms of the engagement has still to be agreed upon, so that the reasonable fee to be paid on a *quantum meruit* for the services rendered would have to be decided by the courts or an arbitrator if the parties are unable to agree on a reasonable fee.

And then – after pleadings have been closed – the architects did a most unusual thing. They wrote on October 11, 1982 to Lazar terminating their engagement as architects of the project on the ground that they have not been paid all their fees. They also said that they will withhold giving a letter of release until they are paid. By taking this unorthodox step the architects have altered their entire cause of action after they have issued the writ. But they cannot rely on this new cause of action now to found their action in the present proceedings.

Why then did they make this unprecedented

move? Could it be that they now realise that in order to incorporate the P.A.M. scale of charges into their claim they have to come within condition (3) of their terms of engagement? Whatever may have been the reason, Lazar responded almost at once with an application in chambers for an order to compel the architects into giving "a letter of release [so as] to enable [Lazar] to appoint another architect to proceed with the proposed construction of the 27-storey office building on Lots 51 and 52, section 45, Jalan Ampang, Kuala Lumpur." This is actually an application for a mandatory injunction; in a proper case, the court has no more hesitation in granting a mandatory injunction than any other injunction. It is made on an interlocutory application. It can be done: see *Halsbury's* Laws of England, 4th ed. vol. 24, para. 948.

Mr. Narayanan, on behalf of the architects, says that until they are paid, the architects have a lien and that they do not have to give the letter. It is trite law that an architect has a possessory lien on the plans and drawings prepared by him and that he need not deliver them up until he has been paid. He can even bring an action for his charges although he still retains the plans: see *Halsbury's* Laws of England, 4th ed. vol. 4, para. 1363. The law is lucidly illustrated in *Caldwell* v. *Sumpters*[2].

"It seems plain" said Megarry J. in that case, at p.482, "that a solicitor's possessory lien is lost if the solicitor parts with possession of the deeds without making any reservation. It also seems plain that the lien is preserved if the solicitor obtains the agreement of the recipient that he will hold the deeds on the solicitor's behalf." The judge was speaking of a solicitor's possessory lien but the principle is applicable to all other possessory liens. It is of general application. He continued, "What is in question here is the intermediate category of an attempted unilateral reservation of the right, not assented to by the recipient." In that case, solicitors when parting with documents on which they had a lien used these words: "These deeds and documents are being sent to you on the understanding that you will hold them to our order, pending the payment of our fees". The reply of the recipient solicitors was, "we are unable to accede to your request to hold the deeds to your order".

"The question, then," posed Megarry J. (at p. 482D) "is whether solicitors who are entitled to a lien on deeds in their possession [would] lose that lien by parting with the deeds if they do so subject to words of reservation which the recipient does not accept." The judge after a detailed and illuminating examination of the cases said, at pp.485 – 486:

> "In those circumstances, I think that I must rely upon principle, with such assistance as may be drawn from the cases and the books. The starting point is that a solicitor's possessory lien, like other possessory liens, depends upon his ... retaining possession of the deeds or other property in question. This rule, however, is not absolute. First, even if the solicitor voluntarily parts with the deeds, he may preserve his lien if the recipient has expressly or impliedly agreed to hold the deeds for the solicitor's use. I have already mentioned some authorities which support this view: and I think that *Whalley* v. *Halley* (1829) 8 L.J.O.S. K.B. 6 is really an instance of this. ...
>
> Second, there is also authority for the view that where the solicitor loses possession by some trickery or wrongdoing his lien continues. Thus although he loses his lien if he parts with the documents voluntarily, even if by mistake, he does not lose it where they are, in the words of Littledale J. in *Dicas* v. *Stockley* (1836) 7 C. & P. 587, 591, 'got out of his possession wrongfully,' as where they are abstracted without his consent by a retiring partner of his: *In re Carter* (1885) 34 W.R. 57. However, apart from cases such as these, the general rule seems to be that any voluntary parting with possession destroys the lien. I can find no authority to support the contention that a unilateral reservation by the solicitor, not accepted either expressly or tacitly by the recipient of the documents, suffices to maintain the lien."

And he concluded, at p. 488:

> "It therefore seems to me that the lien has gone. The lien is based upon possession, and if there is a voluntary parting with the deeds, not brought about by any wrongdoing, I think the lien will be lost unless the parting with the deeds is accompanied by some effective arrangement which preserves that possession for the solicitor, such as an agreement to hold the deeds on his behalf. It also seems that a solicitor who, as here, dispatches the deeds with a request for the recipient to hold them on his behalf will remain entitled to his lien if the recipient acceded to the request, even though there is a period before he does this while the deeds remained unprotected by any effective agreement. In this way the solicitor who thus puts himself at risk may, in the end, be saved if the risk is resolved in his favour. This would be in line with those authorities which support the proposition that a lien is capable of being revived if possession of the property is regained after it has been lost: see, for example, *Levy* v. *Barnard* (1818) 8 Taunt. 149. It may also be that a failure either to reply to such a request or to return the deeds might in the particular circumstances of a case be construed as the tacit acceptance of the request. But where, as here, there is a prompt and clear rejection of the request, I can see no sound basis upon which a continuance of the lien could be based."

The Court of Appeal disagreed with that last remark and held that the lien was not destroyed in that case. Salmon L.J. said, at pp. 495 – 496:

> "The crucial factor in this case is that [the solicitors], because of their lien, had the legal right to possession of

the documents. The documents were being offered on the terms of the letter of January 15. The law does not, in my view, allow retention of the documents and repudiation of the terms upon which they are offered. This seems to me to be clear on principle. There is little authority on the point, possibly because it is so plain. What authority there is tends to support the view I have formed. There is certainly no authority the other way. The textbooks all proclaim that a lien is not lost by parting with physical possession if the circumstances show, as in the present case, that the lien is being expressly or impliedly reserved: see *Bowstead* on Agency, 13th ed. (1968), p. 232, *Halsbury's* Laws of England, 3rd ed. vol. 36, (1961), p. 180, *Powell*, The Law of Agency, 2nd ed. (1961), p. 372; *Stoljar*, The Law of Agency (1961), p.309; *Fridman*, The Law of Agency, 3rd ed. (1971), P. 154 and *Cordery* on Solicitors, 6th ed. (1968), p. 432."

And Stamp L.J. said, at p. 497:

"It is plain, as Megarry J. remarked *ante*, p. 482D, that a solicitor's possessory lien is lost if the solicitor parts with the possession of the deeds without making any reservation.

It is also plain that if the solicitor obtains the agreement of the recipient to do so the recipient will hold the deeds on the solicitor's behalf and the solicitor's lien will not be lost. In my judgment it is also the law that, where a solicitor having a possessory lien on his former client's papers put them in the hands of a third party to hold them to the order of the solicitors or for the account of the solicitor, the lien is not destroyed, because the possession of the transferee becomes the possession of the solicitor. In my judgment it makes no difference that the transferee is the solicitor of the owner of the papers.

If this were not the law, powerful considerations of convenience, and, indeed, in some cases but not in this, of honest dealing, would be frustrated."

Applying the law to the present case, the architects' possessory lien depends on the plans and drawings remaining in their possession. It is plain that they have a lien on the plans that are with them but not on those which they have voluntarily parted with possession to Lazar. Their possessory lien is lost when they parted with the plans without making any reservation.

But here Lazar does not want the plans that are with the architects. It wants a letter of release so that it can appoint another architect to take over the project to put up the building at Jalan Ampang.

I am told that no architect will take over from another without a letter of release from the outgoing architect. One can see that this letter is a very important document for without it a builder or an owner of land will have difficulty in employing another architect to replace the one that has left.

The reason for requiring this letter is not far to seek. It is to be found in this passage from the judgment of Lord Denning M.R. in *Blair* v. *Osborne & Tomkins* at p. 84:

"It is quite plain that Mr. Blair was entitled to the copyright in his drawings. He drew them himself, and that makes him *prima facie* the owner of the copyright in them. ... As owner of the copyright, Mr. Blair was certainly entitled to stop people in general from copying his drawings, or building a house from them; but that is subject to this qualification: he could not complain of anything for which he had given licence or permission. The question in this case is whether he had given a licence."

As here, an architect is entitled to the copyright in his plans and drawings because 'plans, charts and diagrams' are artistic works within the meaning of section 2(1)(ii) of the Copyright Act, 1969 and by virtue of section 4 artistic works are works which are eligible for copyright. As owner of the copyright, an architect could prevent people from using his drawings or copying from them. His copyright in them would be infringed unless he consents or gives permission to someone to use the drawings. He could not complain – as Lord Denning M.R. remarked – of anything for which he had given licence or permission. And that is what a letter of release is intended for: to give licence or permission to someone to use the architect's drawings.

I return to *Blair* v. *Osborne & Tomkins*[1]. The question – posed Lord Denning M.R. – is whether he had given a licence. He said, at pp. 84 – 85:

"The R.I.B.A. conditions do not give any guidance on this question of licence. But they do contain a condition [Condition of Engagement I] which is of some relevance:

'An engagement entered into between the architect and the client may be terminated at any time by either party upon reasonable notice being given.'

Suppose now that after the architect has made the plans, a contract is made by the owner with a builder whereby the builder is to build the house in accordance with the plans: and then the architect says he will go on no longer as architect for the work, and gives one month's notice. Can the architect refuse to let the owner and the builder use the plans and make the house from them? Surely not. At that stage, at any rate, when the owner has placed a contract for the work, the architect must be taken to have impliedly licensed the work to be done in accordance with the plans. Now take it back to an earlier stage, when the architect has drawn plans and obtained planning permission on the faith of them, and been paid for them. Can the architect then withdraw from the work and refuse to let the owner use the plans? Surely not. That shows that, at that stage also, the architect must be taken to have impliedly licensed the building to proceed in accordance with the plans.

Those illustrations show, to my mind, that when the owner of a building plot employs an architect to prepare plans for

a house on that site, the architect impliedly promises that, in return for his fee, he will give a licence to the owner to use the plans for the building on that site. The copyright remains in the architect, so that he can stop anyone else copying his plans, or making a house from them; but he cannot stop the owner, who employed him, from doing work on that very site in accordance with the plans. If the owner employs a builder or another architect, the implied licence extends so as to enable them to make copies of the plans and to use them for that very building on that site: but for no other purpose. If the owner should sell the site, the implied licence extends so as to avail the purchaser also.

There is no authority in this country on this subject. But I am glad to find that there is a case in the Supreme Court of New South Wales. It is *Beck* v. *Montana Constructions Pty. Ltd.* [1964-65] N.S.W.R. 229. I find the reasoning of Jacobs J. very convincing. He said, at p. 235:

> ' ... the payment for sketch plans includes a permission or consent to use those sketch plans for the purpose for which they were brought into existence, namely, for the purpose of building a building in substantial accordance with them and for the purpose of preparing any necessary drawings as part of the task of building the building.'

I entirely agree.

Applying this principle, it seems to me that the payment of £70 to Mr. Blair covered the use of drawings, not only by Mr. Underwood and Mr. Norris themselves, but also by the people to whom they sold the plot, and by the surveyors and workmen of the purchasers, so that they might make copies of them and otherwise use them in the accustomed way for building a house on this site."

And Widgery L.J. said, at pp. 86 – 87:

"Mr. Stanley contends that if an engagement of an architect does not run its full course and fees are payable under the partial services provision to which I have referred, then, despite the fact that the architect has been fully compensated for all the work he has done, the client nevertheless cannot use the product of that work if it infringes the architect's copyright. That the architect retains the copyright is beyond dispute. He needs it for many good reasons. He needs it to protect himself against the possibility of his plans being used by others who have paid him no fee, or being used for purposes other than the specific building which was contemplated. However, it is common ground between counsel that though the architect retains the copyright, and though the use of the plans would prima facie be a breach of copyright, yet there was in this agreement an implied licence enabling the client to use the plans to some extent. The issue between the parties before us is: what is the extent of that licence, or what is the extent to which the client is impliedly authorised to use the plans? Mr. Stanley in his full argument developed this point in great detail; but I think for my part that his argument can be summarised in a single sentence. He contends that the licence to the client to use the plans is conditional on the architect continuing to be employed. Accordingly he says that if the engagement breaks off at the planning permission stage, if I may so describe it, and the architect is not to be employed thereafter, there is no further licence to use the plans.

Mr. Wilson-Smith on behalf of the defendant puts the matter more simply and says that the implied licence is to use whatever plans have been prepared for all purposes for which those plans would normally be used, that is to say, all purposes connected with the erection of the building to which the plans relate. I have no hesitation in saying that Mr. Wilson-Smith's approach is right. If it be right that the architect can hold the client to ransom, as Mr. Stanley's argument really implies, this would be quite inconsistent with the clear term in the engagement that that engagement could be put an end to at any time. If Mr. Stanley were right, an architect would have very powerful means of preventing his client from dismissing him; and that would be inconsistent with the spirit of the terms of employment if not inconsistent with their letter. I am indebted to Jacobs J. for the guidance given in *Beck* v. *Montana Constructions Pty. Ltd.*, to which Lord Denning M.R. has referred. That judgment seems to me to suit the circumstances of this case precisely, and, if I may say so to be entirely correct in every way. I will repeat – because I think it valuable – the general principle which Jacobs J. lays down. He says, at p. 235:

> 'it seems to me that the principle involved is this; that the engagement for reward of a person to produce material of a nature which is capable of being the subject of copyright implies a permission, or consent, or licence in the person giving the engagement to use the material in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement.'

It was contemplated by the parties in this case that the plans would be used in furtherance of the erection on this site of houses of the type to which the plans relate. Mr. Stanley, however, further submits that on the facts of the present case the only engagement by the architect was to prepare plans to lead to the grant of planning permission, and so he argued that that being the only purpose for which the plans were prepared, it was the only purpose for which the parties contemplated that they should be used. I am quite unable to agree with this. The preparation of plans is a progressive process which begins with the most elementary sketches and works on through the details of outline planning permission and detailed planning permission, to working drawings and completion of the work. The observation that the plans in question were only plans to lead to planning permission simply means that they were plans which at that point had only been developed to the extent necessary for that purpose. It is quite wrong and unreal to suggest that the only function of the plans was to obtain planning permission. Their function was to enable that application to be made, and thereafter, if the application was successful, to form the basis for more detailed drawings which would lead to the final plans for the erection of the building."

The law is further clarified in the next case. It seems to me that the *Blair case* is decisive authority for the view that there is an implied licence that an architect will allow his plans to be used for all purposes connected with the erection of buildings to which they relate in return for his fee. However, the licence is implied only when he charges a reasonable fee for the plans but not when he charges a nominal fee for them: *Stovin-Bradford* v.

Volpoint Ltd.[3]. This is what Lord Denning M.R. said, at pp. 1015 – 1016:

"In view of the discussion which we have had, I think the law stands thus:

When an architect prepares plans at the request of a client, the copyright remains in the architect. The client cannot reproduce those plans or any substantial part of them, either in the form of another plan or in the form of the building itself, unless he has the licence of the architect, express or implied. There is nothing in the R.I.B.A. conditions which gives him an express licence. But when the architect charges the full scale fee for the work so far done, that fee in the ordinary way must be taken to include permission to use the plans for the building of that very house. That I think follows from the very structure of the R.I.B.A. conditions. ...

It seems to me that the scale charges for partial services are so fixed that they contain a 'built-in' compensation for the use of the designs and drawings right through till the completion of the work. Take, for instance, a new building which is estimated to cost £100,000. The full fee is 6 per cent. of the cost, that is £6,000. In return for that fee the architect has not only to prepare the plans. He has much to do in the construction of the building. He has to supervise the work and issue certificates right through to the end. Suppose now that the architect withdraws after preparing the working drawings and specification, but before tenders are invited. The scale charge up to that stage is two-thirds of the full fee of £6,000, that is, £4,000. I cannot believe that, after getting £4,000, the architect can say to the client: 'I withdraw from the work and you are not to use my plans or drawings at all. I will get an injunction to stop you.' Can it really be supposed that the client is to go off to another architect, and get him to work out another set of plans and drawings all over again, and pay him another £4,000 for the self-same building? Surely not. The client is entitled to say: 'I have paid you £4,000 for the plans and drawings. That must include the right to use them for the construction of the buildings.'

I have taken an illustration where the architect withdraws from the engagement; but it must be the same if the client does so. Each is equally entitled. I have taken it at the third stage, but it must be the same at the second and first stages. The scale fee at each stage is based on a percentage of the total cost. It includes a licence to use the designs or plans for the purpose of the building.

In both *Beck* v. *Montana Construction Pty. Ltd.* [1964-65] N.S.W.R. 233 and *Blair* v. *Osborne & Tomkins* [1971] 2 Q.B. 78, quite recently, the architect charged according to the R.I.B.A. scale, one-sixth of the full fee. That implied a licence to the client to use the plans for the building. ...

But in the present case Mr. Stovin-Bradford charged far less than the R.I.B.A. scale. He agreed a fee of 100 guineas when he was asked to do the work. He worked it out, not according to the scale, but on the estimated time it would take him. It turned out that it only covered the time of the assistant, and nothing for Mr. Stovin-Bradford's time. The 100 guineas was truly a nominal fee when compared with the scale fee which would have been at this stage, on a £90,000 building, £900. It cannot by any intendment carry with it an implied licence to use the plans without paying anything for them."

And Salmon L.J. said, at p. 1017:

"In accordance with the contract of July 13, 1966, the architect prepared his drawings. These admittedly revealed a novel and attractive design which highly commended itself to the owners. On the basis of these drawings, full planning permission was granted. The owners then built their factory incorporating some of the principle features to be found in the architect's drawings. The owners did not, however, engage the architect to act in the erection of their factory and have paid him nothing beyond the 100 guineas fee to which I have referred.

This appeal raises a short point: what terms should be implied into this contract? It is trite law that it is permissible to imply a term into a contract only if such a term is necessary to give the contract ordinary business efficacy.

It is plain that some term must be implied into this contract for that purpose. Since the architect admittedly owned the copyright in his drawings, it was necessarily an implied term of the contract that the architect licensed the owners to make use of the drawings for the purpose of obtaining planning permission; otherwise the whole purpose of the contract would have been stultified. Graham J. in a very clear and careful judgment came to the conclusion that it was unnecessary to imply any other term into the contract in order to give it business efficacy. I entirely agree with him."

The judge went on to say, at pp. 1018 – 1019:

"Whether any term is to be implied in a contract for the purpose of giving it ordinary business efficacy, and, if so, what term, must in each case depend upon the contents of the contract itself and the particular circumstances surrounding it. It is, in my view, impossible to lay down any more specific proposition of general application in this field – because there rarely are two cases exactly alike. There are striking differences between *Blair* v. *Osborne & Tomkins* and the present case. In *Blair* v. *Osborne & Tomkins* the architect charged a fee of £70. On no view could this have been a nominal fee, since it was the maximum fee the architect could have charged, representing, as it did, one-sixth of the total minimum fee he would have received had he been employed in the erection of the two modest houses represented in his drawings: see clauses 1 and 3(ii) of the R.I.B.A. Conditions of Engagement and Scale of Professional Charges (1962 rev.).

In the present case the estimated cost of erecting the factory was upwards of £90,000 and therefore the scale fee for preparing drawings for planning permission would have been in the region of £1,000. One knows that in practice a prescribed maximum fee tends to be treated as the prescribed fee, although the same is rarely true of a prescribed minimum fee. In all the circumstances, the fee of 100 guineas can, in my view, be regarded as nothing but a nominal fee. Mr. Lunzer has rightly conceded that if the architect charges only a nominal fee for the drawings he prepared for the purpose of seeking planning permission, a licence cannot be implied to use these drawings for the purpose of erecting the building. It follows therefore that

the judge's decision was plainly right. Quite often an architect charges a nominal fee for his work connection with applications for planning permission because if this permission is refused, all the money spent by the owner is thrown away. If planning permission is granted and the architect is employed as the architect under the building contract, he earns substantial fees even if he charges only the minimum under the scale. In these circumstances, he usually gives credit for the nominal fee he has originally charged for his drawings. It would be strange indeed if the owner could pay only a nominal fee for these drawings, refuse to employ the architect under the building contract, and then successfully claim that he had an implied licence to use the copyright drawings for the purpose of erecting the building. Far from such a licence being necessary to give the contract ordinary business efficacy, it could only give it an air of injustice and absurdity."

What is a reasonable fee? Salmon L.J. expressed the view that there are some situations where even the R.I.B.A. scale of charges may not be reasonable. He observed, at p. 1019:

"I am, however, by no means convinced that even if an architect were to charge the full scale fee for preparing drawings for planning permission purposes, in every case a licence to use the drawings for erecting the building would necessarily be implied. Take the case of an architect who is world-famous for the brilliance and originality of his designs. He normally, with good reason, commands a fee considerably in excess of the minimum prescribed in clause 1 of the R.I.B.A. scale. A building owner is anxious to have, say, a large hotel designed by this architect. He engages him to prepare drawings for the purpose of planning permission at what for this architect is the comparatively modest maximum fee prescribed in clause 3(ii) of the scale. Planning permission is granted. Can the owner then refuse to employ the architect any further and yet get the benefit of his design for the purpose of erecting his hotel without having any express licence to use the copyright design for this purpose? I do not propose to express any concluded view on this point until it arises for decision. It may be that the answer is that a licence to use the drawings for building purposes would be implied if the building owner offers to appoint the architect as architect under the contract at what would be a reasonable fee for this architect, and the architect capriciously refuses or demands an exorbitant fee. Such an answer would at any rate protect both the building owner and the architect. In the circumstances postulated, the licence, if it exists, can exist only by implication. Accordingly, it seems reasonable that when it is implied it should be implied only on terms which are fair to both parties."

The law can be summarised thus:

When an architect charges a reasonable fee for the work so far done, that fee must be taken to include a licence to use the plans for the purpose of putting up the building: *per* Lord Denning M.R. in *Stovin-Bradford* v. *Volpoint Ltd.*, at p. 1015B. In *Blair* v. *Osborne & Tomkins*, the architect charged according to the R.I.B.A. scale, one-sixth of the total fee, for plans sufficient to obtain planning approval. That implied a licence to the client to use the plans for the building; see *per* Lord Denning M.R. in *Stovin-Bradford* v. *Volpoint Ltd.*, at p. 1016B. But when an architect charges only a nominal fee for the purpose of obtaining planning permission, that fee cannot carry with it an implied licence to use the plans for the purpose of erecting the building: *Stovin-Bradford* v. *Volpoint Ltd.*; although it is "necessarily an implied term of the contract that the architect licensed the owners to make use of the drawings for the purpose of obtaining planning permission; otherwise the whole purpose of the contract would have been stultified." – *per* Salmon L.J. in *Stovin-Bradford* v. *Volpoint Ltd.*, at p. 1017G.

"If the architect had been engaged for the whole project, there would have clearly been an implied licence to use his drawings for erecting the building. If the engagement had been terminated by either party before the building had been completed, the licence would almost certainly still have operated; but the reasonable fee to be paid for the services rendered prior to the termination, if not laid down by the scale, would have had to be decided by the courts or an arbitrator in the absence of agreement between the parties."

– *per* Salmon L.J. in *Stovin-Bradford* v. *Volpoint Ltd.*, at p.1018D.

In the present case, the architects have been engaged for the whole project. While still employed, they sue for partial payment of their fees for the work so far done. They claim entitlement to $514,000 as the balance of fees due to them for partial services performed up to February 28, 1982. The agreed full fee is 4 per cent. of the total cost of the building when the architects do the whole work right through to completion. It is a term of condition (2) of the engagement that a schedule of partial payment of the full fee at the various earlier stages is to be agreed upon separately. But to date no scheme for such partial payment has yet been agreed. In those circumstances, the reasonable fee to be paid for the services rendered for the work so far done, which in the present case has not been laid down by the P.A.M. scale, would have to be decided by the courts or an arbitrator in the absence of agreement between the parties. Approaching the case on the basis of the plaintiff's cause of action in the statement of claim, the question of what is a reasonable fee on a *quantum meruit* has to be decided. I do not think that in these proceedings the architects can rely on their letter of October 11, 1982 terminating their engagement

in order to attach the P.A.M. scale of charges as the fees for the partial payment of the total fee at the various stages before completion. This is not their cause of action in the present case.

In any case, even if the architects can approach these proceedings on the basis that their engagement had been terminated, there would still be implied a licence to use their plans. The licence would still operate whichever way one approaches this case. There is no question here of a nominal fee. The architects have so far been paid $80,000. It is the amount of the balance of what is a reasonable fee to be paid for partial services that is in question. If the architects can rely on termination without bringing a fresh action, then the reasonable fee is that as laid down by the P.A.M. scale; see condition (3) of the terms of engagement. If, on the other hand, as here, the architects cannot rely on termination, then the reasonable fee for partial services rendered for the work so far done has to be decided by the courts or an arbitrator in the absence of agreement between the parties.

In these circumstances, quite clearly there would have been an implied licence to Lazar to use the plans for the purpose of erecting the building.

What then is the practical significance of this licence? As was said by Lord Denning M.R., when an architect prepares plans at the request of a client, the copyright remains in the architect. Unless he has the licence of the architect, expressed or implied, the client cannot reproduce those plans or any substantial part of them, either in the form of another plan or in the form of the building itself, nor in any way use them for the purpose of erecting the building. Without this licence, the client can be sued by the architect for infringement of his copyright. As owner of the copyright, the architect can even stop the client from copying his plans, or building a house from them.

In the case that I have adverted to: *Stovin-Bradford* v. *Volpoint Ltd.*, the architect brought an action claiming against Volpoint Properties Ltd. and Uniment Ltd., respectively property developers and owners of a factory at Thatcham, an injunction and damages for infringement of his copyright in specified architectural drawings and plans relating to development at the site in Thatcham. The Court of Appeal, affirming the decision of the judge at first instance, held that as the fee agreed was nominal, there was no implied licence to use the plans for the purpose of erecting the building. That being so, the architect succeeded in his action for infringement of his copyright. He was awarded damages which were assessed on the basis of what would be fair remuneration for a licence to use the plans for the purpose for which they were used. This is how Lord Denning M.R. put it, at pp. 1016 – 1017:

> "The defendants took the plaintiff's plan and took it as if they had a licence to use it as they pleased – to take so much of it as suited them and leave out what they did not want. They ought to pay as damages an amount equivalent to the fee which they would have had to pay for a licence. This is how Crossman J. put it in *Chabot* v. *Davies* [1936] 3 All E.R. 221, 228: What is the remuneration which the plaintiff could fairly have got for his plan if the defendant had applied for his licence to use it? That was approved by Uthwatt J. in *Meikle* v. *Maufe* [1941] 3 All E.R. 144."

And Salmon L.J., at p. 1020:

> "The damages must be assessed on the basis of what would be fair remuneration to have paid the architect for a licence to use the copyright for the purpose for which it was used: see *Chabot* v. *Davies* [1936] 3 All E.R. 221 and *Meikle* v. *Maufe* [1941] 3 All E.R. 144."

In the other case: *Blair* v. *Osborne & Tomkins*, the plaintiffs, Dennis Blair, architect, claimed damages against and an injunction restraining the defendants from infringing his copyright in a drawing of a proposed pair of semi-detached houses. He failed in his action for infringement of the copyright. The Court of Appeal held that there was an implied licence to use the plan in return for his fee.

Where there is no licence, the architect can sue for infringement of his copyright, as in *Stovin-Bradford* v. *Volpoint Ltd.*, and the amount the client ought to pay as damages is equivalent to the fee which he would have had to pay for a licence. But where there is a licence, express or implied, and the architect has not received all the fees that are due to him, he should sue for his fees, either on a *quantum meruit* or as agreed (depending on the case), and not for infringement of the copyright.

Whether there is licence or not, the practical result appears to be the same. Depending on the label in which the cause of action is founded, the client has either to pay the fee or damages which is equivalent to the fee he has to pay.

However, where an architect has been paid a reasonable fee, he should not sue at all because the fee carries with it an implied licence – he will fail if he sued for infringement, as happened in *Blair* v.

Osborne & Tomkins: quite obviously, there is no question of suing for fees as he had been paid.

If he has not been paid yet or been paid only part of his fees and he does not want his plans to be used by his client or others until he has been paid, then he should not part with them without first expressly reserving his lien. His proprietary lien on these plans is preserved and not destroyed if he puts them in the hands of his client to hold them to his order or for his account: *Caldwell* v. *Sumpters, ante.* He may use words like, 'I am sending to you these plans and drawings on the understanding that you will hold them to my order until the payment of my fees up to this stage'.

Since, and I have so found, there is an implied licence for Lazar to use the plans for the purpose of erecting the building in the instant case, the architects cannot bring proceedings against Lazar for infringement of their copyright. In fact they never did. Although the copyright remains in them, but because of the implied licence, their client Lazar can use those plans for erecting the building.

But another architect must not put his name on those plans. He must not put them up as his own for that would be technically an infringement of the plaintiff's copyright. This is how Lord Denning M.R. put it in *Blair* v. *Osborne & Tomkins*, at p. 85:

"But there is one small point I should mention. When Osborne & Tomkins put in their detail plan to the local council, they put their own name on it as though it were all their own work; whereas it was not all their own work. Part of it was Mr. Blair's original drawings. It is conceded that the implied licence did not enable them to put forward part of his work as their own. To that extent, therefore, it was not licensed. But no damage flowed from that misdescription. The local authority said that the name on the document did not influence them. For that technical infringement the judge awarded nominal damages of 40s. Subject to that small nominal award, the judge dismissed the claim and gave no further damages. I think that was quite right. The appeal should be dismissed."

I do not think that there can be any real objection to giving the letter of release. Actually, such a letter is, in law, quite unnecessary – the implied licence suffices – but without it Lazar may have difficulty in employing another architect. I therefore grant the application, if only, to give efficacy to the licence.

I suppose the architects have brought this quite unnecessary litigation on themselves. If they had sued after they have determined their engagement with Lazar, they would have got judgment a long time ago because the fee would be that as laid down by the P.A.M. scale.

Instead, they choose to pursue the present action where the defence is that the reasonable fee is as on a *quantum meruit*: Every man to his taste.

From the above judgment the plaintiff appealed to the Federal Court.

FEDERAL COURT.

V.K. Palasuntharam (*Jason Lee* with him) for the appellant.

Loh Siew Cheang (*William J.K. Leong* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): This appeal is against the decision of the learned Judge in ordering the appellant to issue a letter of release. There are fifteen grounds of appeal but mostly inter-related. Some of the grounds have no substance at all. We do not propose to embark on a journey into all the grounds but would concentrate on the main points which merit consideration. Central to all these points is the main issue, that is, whether the learned Judge was right to make the order in the circumstances.

We need only to set out the facts shortly. On April 17, 1980 the respondent employed the appellant, a firm of architects, to build a 27-storey office building at Jalan Ampang, Kuala Lumpur on the usual terms as defined by the Pertubuhan Arkitek Malaysia (P.A.M.) conditions of engagement. The employment was for the whole project. The overall fee agreed was 4% of the total contract cost of the project. Over two years later, on August 18, 1982, while approval of the plans was under consideration by the relevant planning authority, the appellant sued the respondent for the balance of the professional fees of $514,000. Up to that stage the appellant had already been paid $80,000. The respondent denied the claim and averred that the sum claimed was not a genuine pre-estimate of the professional fees. It is maintained that the appellant is entitled, if at all, only to a *quantum meruit* for services rendered. By paragraph 6 of the defence the respondent alleged that the appellant was in breach of contract and negligently failed to exercise reasonable care, as a result the approval

of the drawings was delayed. This affected the sales of the properties by the respondent. Hence the counterclaim for consequential loss of $450,000. The appellant disputed the counterclaim.

Curiously enough, on October 12, 1982, after suing the respondent, the appellant then terminated its services as architects on ground of failure of payment of fees. On November 1, 1982 the respondent wrote to the appellant requesting for the dispute to be referred to P.A.M. for decision and pending reference the appellant was to issue a letter of release to enable them to engage another architect to continue with the work. On November 3, 1982 the appellant replied denying the request and stating that the P.A.M. conditions of engagement should not apply as there was no agreement to refer any dispute to arbitration. Until all the fees were paid the appellant would not issue a letter of release.

By a Summons-in-Chambers dated November 25, 1982 the respondent applied for an order that the appellant forthwith issue the respondent with a letter of release to enable the respondent to engage another architect to proceed with the proposed construction of the building. On December 2, 1982 the building plans were approved by the Jabatan Arkitek Bahagian Kawalan Bangunan Dewan Bandaraya. The validity of the approval was for one year only. After hearing the parties the learned Judge made an order in terms on February 5, 1983. Hence the appeal.

The appellant complained that no prayer for the letter of release was prayed in the counterclaim and that it was contrary to 0.29 r.6 of the Rules of the High Court 1980. He also submitted that an interlocutory application should only be made in aid of a prayer in the Statement of Claim or in the Defence or Counterclaim. The short answer is, of course, provided by 0.29 r.1(1) which reads:

"An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be."

The appellant took objection to the form of the order as it was contrary to 0.29 r.1(4) of the Rules of the High Court 1980 which provides that "An order for interim injunction must be in Form 58." He referred to the *Supreme Court Practice 1982* and cited *Gebruder Naf* v. *Ploton*[4] and *Morgan* v. *Greatrex*[5]. We think in the circumstances his objection is without substance. 0.1 r.7 of the Rules of the High Court 1980 is clear and states that:-

"The Forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require."

The English 0.1 r.9(1) of the Supreme Court Practice 1982 is practically word for word the same as our 0.1 r.7 except for our "Appendix A", the English uses Appendices". *The Supreme Court Practice 1982, Volume 1*, at page 9 under the effect of the rule it is stated:-

"The need for these prescribed forms is to ensure, so far as possible, uniformity and conformity in the practice and procedure of the High Court. They must be used whenever applicable, but nevertheless a certain latitude is permitted, so that these forms are allowed to be used 'with such variations as the circumstances of the particular case require'. This latitude is intended to mitigate excessive formality and technicality, when a variation to meet the requirements of a particular case would make the form more valuable and suitable as an instrument to achieve the real objective of the form....."

Mallal's Supreme Court Practice, 2nd Edition by Tan Sri Datuk Chang Min Tat, formerly a Judge of this Court, has this to say at page 7:—

"Variations required by the circumstances of a particular case are permitted. Strict and slavish adherence to forms and rules is deplored as it can sometimes hinder the administration of justice, but the forms and the rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice ....."

The difficulty in deciding the question of fees is the issuance of the writ by the appellant before terminating its services. The learned Judge adverted to this point. We do not think it is fair to say that he did not consider the full provisions and effects of Clause 8.1 and Clause 8.2 of the P.A.M. scale of charges. The respondent did not dispute liability but merely challenged the quantum. This has yet to be tried. At pages 73 and 74 of the Appeal Record the learned Judge remarked:-

" ..... Lazar may well be right because the building has still to be built and the schedule for the partial payment of the full fee at the various stages before completion has yet to be agreed upon. What Lazar really is saying amounts to this: that, according to conditions (2) and (3) of the terms of engagement, the P.A.M. scale for the payment of a portion of the total fee at the various earlier stages does not apply in this case because there was no agreement to apply it but that it would apply where there was an abandonment of the project or a termination of the engagement."

Where an architect contracts to perform an

entire work, as for instance, to prepare charges and superintend the whole work, for a certain sum whether fixed on the basis of a commission on the outlay or otherwise, his charges are not recoverable until the whole work is completed, but sometimes express provision is made for payment by instalments, for which the architect can sue as they fall due. In the letter dated April 7, 1980 the appellant stated, *inter alia:*—

"We write to thank you for your appointment of ourselves as your architects. The fee agreed with you is 4% of the overall construction costs. The range of services shall be as per the attached sheet.

The schedule of payment of fees shall be agreed separately.

In the unlikely event that we are terminated or the project abandoned, the payment of fees due shall be in accordance to the usual PAM schedule."

As there was no abandonment of the project or termination of the engagement of the services of the appellant and further the parties had not yet agreed on the scheme for partial payment of the total fee at various earlier stages, the learned Judge considered that the question of reasonable fees would have to be decided by the Court at the trial.

We cannot say the learned Judge was wrong when he went on at pages 89 and 90 of the Appeal Record to say:-

".....I do not think that in these proceedings the architects can rely on their letter of October 11, 1982 terminating their engagement in order to attach the P.A.M. scale of charges as the fees for the partial payment of the total fee at the various stages before completion. This is not their cause of action in the present case.

. . . . . .

. . . . . If the architects can rely on termination without bringing a fresh action, then the reasonable fee is that as laid down by the P.A.M. scale; see condition (3) of the terms of engagement. If, on the other hand, as here, the architects cannot rely on termination, then the reasonable fee for partial services rendered for the work so far done has to be decided by the courts or an arbitrator in the absence of agreement between the parties."

In support of the question of fees the appellant cited the Singapore case of *Soon Nam Co. Ltd.* v. *Archynamics Architects*[6]. There the respondents, a firm of architects, terminated the contract after their plans were returned by the Planning Department without having been approved or disapproved. They claimed the sum of $152,000 being one-third of 8% of $5.7 million, the estimated costs of the building project, or, alternatively, the sum of $152,000 on a *quantum meruit*. The learned Judge allowed the claim to the extent of $76,000. The appellate court dismissed the appellants' appeal but allowed the respondents' cross-appeal. It was held that the respondents were entitled to recover payment from the appellants for the work done on their behalf as provided by the contract and in accordance with the Singapore Institute of Architects' Conditions of Engagement and Scales of Professional Charges. As to the respondents' breach of their contract the appellants could have counterclaimed for the said breach but had not done so. In our case we would refer to the oft quoted observations of Lord Diplock in *American Cyanamid Co.* v. *Ethicon Ltd*[7] at page 510:-

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

Before us the appellant advanced the argument that a perpetual injunction could only be granted at the trial. To do so before the trial would be contrary to principles on which an interlocutory application may be granted. In support *Gibb & Co.* v. *Malaysia Building Society Bhd*[8] and *Richards* v. *Richards*[9] were cited. References were also made to the *Supreme Court Practice 1982 Volume 1* page 511, section 45 of the Judicature Act 1925 and paragraph 29/1/3 of the Sixth Cumulative Supplement to show that our 0.51 does not give the Court such wide power. It is also the contention of the appellant that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. This view is expressed in *Wah Loong (Jelapang) Tin Mine Sendirian Berhad* v. *Chai Ngen Yiok*[10] and referred to in *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.*[11] Where an interlocutory injunction is sought the balance of convenience will be the overriding consideration. *Halsbury's* Laws of England, 4th Edition, Volume 24, page 534, paragraph 948 states:-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted...."

The grant of a mandatory injunction is entirely discretionary. Every case must depend essentially upon its own particular circumstances. It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly. When the court decides to grant such an injunction then the court must see to it that that person against whom it is granted knows exactly what he has to do. It might be of interest to refer to *Ratnam* v. *Cumarasamy &*

Anor.[12] where their Lordships of the Privy Council stated that it would not interfere with the exercise of the discretion by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

The Indian Specific Relief Act, 1877 is *in pari materia* with our Specific Relief Act 1950. The right to an injunction depends in India upon the statute and is governed by the provisions of the 1877 Act. Our section 50 is similar to section 52 of the Indian Act 1877. Section 50 says that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. It is the contention of the appellant that when our section 51(2), which is similar to the Indian section 53(2), says in respect of a perpetual injunction that "the defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act which could be contrary to the rights of the plaintiff" that sub-section was using words familiar to the Chancery Division of the High Court in England in the eighteen-seventies. But it comprehends what is now expressed in direct mandatory form. *Halsbury's* Laws of England, 4th Edition, Volume 24, page 595, paragraph 1069, under the heading of Form of Mandatory Injunction reads:-

"It was formerly the practice of the Court of Chancery to word mandatory injunctions in an indirect prohibitory form, but now all such injunctions should be worded in the direct mandatory form, such as directing buildings to be pulled down and removed. There is now no distinction in principle between the negative and the positive form . . . ."

The footnotes to paragraph 1069 refer to two cases. The first one is *Jackson* v. *Normanby Brick Co.*[13] where the headnote says "An injunction, the effect of which is to require the performance of a certain action such as the pulling down and removal of buildings, should now be made in a direct mandatory form, and not in the indirect form hitherto in use." The other case is *Davies* v. *Gas Light and Coke Co.*[14] where Cozens-Hardy, M.R. in affirming the decision of Warrington, J. approved his statement that:-

"I can find no distinction in principle between granting an injunction to restrain a company from interfering with the right and granting an affirmative order compelling a company to grant the right."

On the above authorities the appellant contended that the order made by the learned Judge had a double effect, that is to say, a positive effect and a negative effect as envisaged by section 53 of our Specific Relief Act, 1950. He pointed out that Encik Kenneth Yeang in his affidavit dated January 24, 1983 was asserting his right within section 51(2) of the 1950 Act. The order made practically shut out his right. We will return to this later. It is also the contention of the appellant that an interlocutory application can only be made in aid of pleading and that the order made by the learned Judge is contrary to principles on which relief can be granted on interlocutory application. In *Richards* v. *Richards*[9] Lord Brandon of Oakbrook stated at page 196:-

"Before 1967 the only power which the High Court had to make an ouster order was the general power to grant injunctions conferred on it by section 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 ("the Act of 1925"). That subsection provided, so far as material: 'The High Court may grant . . . . . .an injunction . . . . . .in all cases in which it appears to the court to be just and convenient so to do.' The subsection replaced in substantially the same terms section 25(8) of the Supreme Court of Judicature Act 1873, in respect of which it had long been held that, despite the apparently wide words of the subsection, the High Court only had jurisdiction to grant injunctions for the purpose of protecting legal or equitable rights: *North London Railway Co.* v. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 40, per Cotton, L.J. It follows that section 45(1) of the Act of 1925, and section 37(1) of the Supreme Court Act 1981 by which it has now been replaced in similar terms, must be interpreted as subject to the like limitation in their scope."

The respondent rightly points out that *Richards* v. *Richards* is concerned with a prohibitory injunction to prevent a husband from going into the wife's house. *Re Court Hill Canteen*[15] cited by the appellant does not necessarily support its contention. Raja Azlan Shah, J., as he then was, stated:-

"I think the law is very clear. A perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail. There is another point. One can bring an action for perpetual injunction before filing a writ of summons in the case of urgency. This is clear from the case of *L.* v. *L.* [1969] 1 All E.R. 852.

On the other hand, it is the contention of the respondent that the respondent is not asking for preventive relief but for mandatory relief. The whole of Part III Chapter 9 consisting of sections 50 and 51 deals with preventive relief and has therefore no application. The respondent is asking for specific relief against the appellant to do something which he is under obligation to do. In *Astro Exito Navegacion SA* v. *Southland Enterprise Co. Ltd. & Anor.*[16] where the sellers, a Panamanian company, agreed to sell a vessel to the buyers, a Taiwanese company in accordance with a

memorandum of agreement dated July 2, 1980 the sellers agreed to deliver the vessel to Taiwan with a valid gas-free certificate and a notice of readiness which was to be countersigned by the buyers. Under the terms of the contract, it was agreed that arbitration of any dispute arising out of the sale was to be in London in accordance with English law. The sellers duly delivered the vessel but the buyers refused to accept the notice on the ground that the gas-free certificate was not valid. So they refused to countersign the notice of readiness. The sellers sued the buyers for specific performance of the contract. The buyers applied for stay pending the outcome of arbitration. On October 24, 1980 the learned Judge stayed the proceedings but on terms which included by way of interim relief granted to the sellers injunctions directing the buyers (1) to countersign the notice of readiness by October 28, 1980, failing which the notice was to be signed by a master of the Supreme Court for and on behalf of the buyers, and (2) to instruct the Taiwan bank to authorise the London bank to release the moneys secured by the letter of credit, the moneys so released to be lodged in the joint names of the parties' solicitors until further order. The buyers failed to comply with the order on the due date so a master of the Supreme Court signed the notice of release. The London bank when presented with the documents necessary to operate the letter of credit refused to release the money. The buyers sued the London Bank for refusing to pay on the letter of credit. Subsequently, the arbitrators awarded damages to the sellers for the buyers' breach of contract. The sellers and the buyers then applied to have the appeal withdrawn but the sellers' claim against the London bank remained alive. So the bank applied to intervene in the appeal. The bank contended, *inter alia,* that the learned Judge had no jurisdiction to make the order of October 24, 1980 because he had purported to grant partial specific performance by way of an interim order. At page 346 Ackner, L.J. said:-

" . . . . . There is, he contended, no instance of an interlocutory order to compel the execution of a contractual obligation, in particular to pay any sum of money. He thus argued that the orders made were not permissible. While conceding that interim mandatory orders are, of course, not infrequently made, he maintained that these were essentially restorative orders, in that they directed a party to restore the status quo which he had disturbed. ."

He went on at page 347 to point out that:-

"The industry of junior counsel for the sellers has unearthed *Smith* v. *Peters* (1875) L.R. 20 Eq. 511. Since this is, in our judgment, a case of considerable importance and which does not appear to have been cited in the past, we feel that we should quote extensively from it. The headnote reads as follows:-

> 'Where an agreement has been entered into for the sale of a house at a fixed price, and of the fixtures and furniture therein at a valuation by a person named by both parties, and he undertakes the valuation, but is refused permission by the vendor to enter the premises for that purpose, the Court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. The Court had jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.' ".

The following passage to be cited also answers the point raised by the appellant that it was contrary to principle to grant a mandatory order of this nature on an interlocutory application before trial. Having referred to the headnote, Ackner, L.J. continued:-

"It was contended for Chase that it was contrary to the practice of the court to make a mandatory order of this nature on an interlocutory application before the hearing of the case. It was argued that there was only an incomplete contract, which the court could not compel the defendants specifically to perform.

Jessel, M.R. said in his judgment (at page 512-513):

> "The first question that I have to consider is whether this application is in accordance with the practice of the Court. I have no hesitation in saying that there is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. I know of no other limit. Whether they are, or are not, to be granted must of course depend upon the special circumstances of the case . . . . . ,, (17)

It may be useful, bearing in mind what Jessel, M.R. said, to refer to 0.92 r.4 of the Rules of the High Court 1980:-

"For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."

Before the learned Judge the question of lien and the effect of the order sought were raised. Encik Param Cumaraswamy pointed out that the appellant chose to come to court instead of arbitration thus giving the court jurisdiction to decide on the issues. He stated clearly that the application was like an application for a mandatory injunction.

A perusal of the notes of proceedings shows that Encik Narayanan for the appellant in actual fact conceded that that could be done when he said:-

"The letter of release can be sought by seeking a mandatory injunction. Halsbury's Laws 4th ed. Vol. 25, p. 334, para. 948."

The learned Judge in fact adopted the very submission made by Encik Narayanan in his judgment at page 75 of the Appeal Record in these words:-

" . . . . . This is actually an application for a mandatory injunction. In a proper case, the court has no more hesitation in granting a mandatory injunction than any other injunction. It is made on an interlocutory application. It can be done: see *Halsbury's* Laws of England, 4th ed. vol. 24, para. 948."

There is no custom that plans belong to the architect and not to the employers. In *Ebdy* v. *M'Gowan*[18] the plaintiff was an architect who had been employed by the defendant to prepare plans and get tenders for a vicarage. The plans were prepared but the defendant changed his mind and declined to proceed. He wrote to the plaintiff offering to pay and asking for the plans. The plaintiff declined to give up the plans but sued for payments and set up a custom amongst architects to retain their plans if the work was not proceeded with. Held, that such custom, even if proved, would be unreasonable, and that the defendant need not pay for the plans unless he got them. The Chief Justice Baron Kelly said at page 11:-

" . . . . . The defendant was perfectly justified in refusing to pay until he had the plans. The execution of and the plans themselves formed the work and labour for which the architect charged the defendant, who was entitled to them if he had to pay for them."

If the employers did not get the plans he was paying for no benefit whatsoever. The point was made by the learned Judge who referred and quoted passages from *Blair* v. *Osborne & Tomkins*[1], and *Caldwell* v. *Sumpters*[2] and *Stovin-Bradford* v. *Volpoint Ltd.*[3] We need only refer to the last case where Salmon L.J. said at page 1018:—

"If the architect had been engaged for the whole project, there would have clearly been an implied licence to use his drawings for erecting the building. If the engagement had been terminated by either party before the building had been completed the licence would almost certainly still have operated; but the reasonable fee to be paid for the services rendered prior to the termination, if not laid down by the scale, would have had to be decided by the courts or an arbitrator in the absence of agreement between the parties. . . . . "

The learned Judge made clear that the architect's lien depended on the plans and drawings remaining in their possession. He stressed that they had a lien on the plans that were with them but not on those which they had voluntarily parted with possession to the respondent. He considered that they had lost their possessory lien when they parted with the plans without making any reservation. The respondent did not want the plans which were with the architect. But the respondent wants a letter of release for the purpose of engaging another architect to continue with the work. This is necessary as no architect would come in unless there is a letter of release.

The learned Judge took the view that, on whichever basis, whether on the Statement of Claim or on the termination of the engagement there would still be implied a licence to use the plans. As Salmon L.J. said at page 1019 in *Stovin-Bradford's case*:-

"Far from such a licence being necessary to give the contract business efficacy, it could only give it an air of injustice and absurdity."

The letter of release signifies that the appellant has given his consent or permission for another architect to continue with the project and, if necessary, to use the plans already approved. According to the terms of the agreement the engagement could be put to an end at any time by either giving the requisite notice. It would be inconsistent to such terms if an architect can say he would not allow his plans to be used unless he is paid the fees he demanded despite the fact that the amount of the fees is pending before the court. The order directing the appellant to issue a letter of release by mandatory injunction is merely incidental. The purpose is to enable the respondent to get another architect to continue with the project. As stated earlier the respondent did not dispute liability but the amount he would have to pay. This can only be decided at the trial. The giving of the letter would not in any way affect the outcome of the trial; where the only question is how much the appellant is to be paid for the services rendered up to that stage. The extent of the architect's liabilities and duties in a given case may also depend on the terms and conditions of his engagement and the terms of the building contract. In construing contracts each word and provision should be carefully considered, not in its ordinary meaning alone, but in the meaning to be gathered from the circumstances of the whole document.

So much has been said about the P.A.M. conditions of engagement and scale of professional charges. Three relevant provisions may be set out.

Clauses 1.4.2, 1.7.1 and 1.8.1. provide as follows:-

"1.4.2 Upon the termination of the Architect's engagement, the Client shall pay to the Architect the balance of fees due together with all outstanding reimbursable charges in accordance with Section 8 of these Conditions. The Architect shall, on receipt of this payment or if there is a dispute existing between the Architect and his Client relating to the Architect's remuneration or otherwise then on such dispute being referred for settlement under clauses 1.7.1 and 1.8.1 of this Agreement issue a letter of release to the Client to enable the Client to appoint another Architect to continue with the work."

"1.7.1 Any difference or disputes may by agreement between the parties be referred to the Institute for decision under the provisions of the Institute's standard form of Adjudication and to accept the award as final."

"1.8.1 Where the parties are unable to resolve the difference or dispute by the procedure as provided in clause 1.7 the difference or dispute shall be referred to the arbitration of a person to be agreed between the parties, or failing agreement within fourteen days after either party has given to the other a written request to agree to the appointment of an Arbitrator, a person to be nominated at the request of either party by the President of either the Institute or the Board of Architects Malaysia."

The appellant says the P.A.M. provisions apply in respect of his fees but not in respect of other matters. This, of course, is an absurd stand for an architect to adopt. Under paragraph 2 of his affidavit dated January 24, 1983 Encik Kenneth Yeang says:-

"(a) Clause 1.7.1 and 1.8.1 of the conditions of engagement are not applicable as there was no agreement between the parties to refer the dispute to the Institute which is a condition precedent;

(b) Pursuant to Clause 1.4.2 of the PAM conditions of engagement he is required to issue a letter of release only if his fees has been paid or the matter referred for settlement under Clauses 1.7.1 and 1.8.1. Since the matter has been referred to court he is not obliged to issue the letter of release."

We can envisage three situations under Clause 1.4.2, namely:-

(i) Where the architect's services are terminated he is not obliged to issue a letter of release unless the balance of his fees is paid;

(ii) Where there is a dispute relating to the architect's remuneration but the dispute is not being referred for settlement under Clause 1.7.1 or Clause 1.8.1 the architect is also not obliged to issue a letter of release;

(iii) Where there is a dispute and is being referred for settlement the architect is then obliged to issue a letter of release.

The contractual obligation to issue a letter of release is not conditional upon the constitution of the forum but on whether the dispute is being referred for settlement. A perusal of the Clause shows a clear intention to have disputes resolved expeditiously. Here we have a dispute as to the architect's remuneration but the architect refused to agree to have it referred for settlement. Instead, he took his client to court and claimed that he was not required to issue the letter of release unless he was paid his fees. As the learned Judge rightly pointed out, the architect's services were not terminated by the client. Neither was the project abandoned. The architect just left and claimed for his fees. Having taken his client to court he then terminated his services in order to take advantage of certain P.A.M. provisions. Clearly he was in breach of his contract. An architect by refusing reference to the Institute for settlement would have a very powerful means of preventing his client from ever getting a letter of release by merely going to court. It must be remembered that the jurisdiction of the court is much wider than any forum which the parties may elect to refer their dispute for settlement. We do not think in the circumstances the court would allow the architect to withhold the letter of release. To do so would, in the words of Widgery, F.J. in *Blair* v. *Osborne & Tomkins* mean "that the architect can hold the client to ransom."

For the reasons given we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Appeal dismissed.

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